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No. 1 OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

RONALD STEVEN PHILLIP,
Petitioner,

v.

RANDY LEE, Warden,
Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

PAUL M. GREEN
Counsel of Record
1304 CAROLINA AVE.
DURHAM, N.C. 27705-3206
(919) 286-2212

22 pp

QUESTIONS PRESENTED

I. WHETHER THE HABEAS CORPUS STATUTE OF LIMITATIONS, 28 U.S.C. § 2244(d), SHOULD BE EQUITABLY TOLLED WHEN THE ONE YEAR LIMITATIONS PERIOD RUNS OUT WHILE PETITIONER'S COUNSEL IS AWAITING RECEIPT OF THE FINAL STATE COURT ORDER, WHICH GETS LOST IN THE MAIL?

II. WHETHER PETITIONER'S RIGHTS TO DUE PROCESS OF LAW AND THE EFFECTIVE ASSISTANCE OF COUNSEL WERE VIOLATED AT PETITIONER'S STATE TRIAL ON DRUG TRAFFICKING CHARGES WHERE A KEY WITNESS WAS ARRESTED, CHARGED WITH PERJURY, THROWN IN JAIL AND COERCED INTO CHANGING HIS TESTIMONY TO FAVOR THE STATE, AND DEFENSE COUNSEL FAILED TO OBJECT AT TRIAL OR ON DIRECT APPEAL?

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RONALD STEVEN PHILLIP,
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RANDY LEE, Warden,
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PETITION FOR WRIT OF CERTIORARI

Petitioner Ronald Steven Phillip respectfully prays that a writ of certiorari issue to review the judgment of the Fourth Circuit United States Court of Appeals, entered on November 15, 2000.

OPINION BELOW

The opinion of the Fourth Circuit is unreported. *Phillip v. Lee,* 2000 U.S. App. LEXIS 29125 (unpublished). *See,* App. 20-21.

JURISDICTION

The judgment of the Fourth Circuit U.S. Court of Appeals was entered on November 15, 2000. This petition is therefore timely filed under this Court's Rule 13. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254.

CONSTITUTIONAL AMENDMENTS AND STATUTES INVOLVED

U.S. Const. Am. VI: In all criminal prosecutions the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

U.S. Const. Am. XIV: . . . No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

28 U.S.C. § 2244(d): (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. . . . (2) The time during which a properly filed application for State postconviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this section.

STATEMENT OF THE CASE

State Court Proceedings:

Petitioner was tried to a jury in the Guilford County, North Carolina Superior Court on June 29, 1995, upon indictments charging him with trafficking in cocaine by possession and by transportation in violation of N.C. Gen. Stat. § 90-95(h)(3). Upon verdicts of guilty, petitioner was sentenced to a minimum of 175 up to a maximum of 219 months in prison (that is, 14.6 to 18.3 years). The N.C. Court of Appeals found no error and the N.C. Supreme Court denied certiorari review. *State v. Ronald Steven Phillip,* No. COA96-18 (N.C. App. 1996) (unpublished), *cert. denied,* 345 N.C. 758, 485 S.E.2d 306 (1997).

On May 8, 1998, petitioner, through counsel, filed a postconviction *Motion for Appropriate Relief* in the Guilford County Superior Court, seeking an evidentiary hearing and a new trial. On June 24, 1998, the court convened a non-

evidentiary hearing, and denied relief by Order dated July 10, 1998. *See,* App. 1-6. The N.C. Court of Appeals denied petitioner's application for certiorari review by order dated September 14, 1998. *See,* App. 7.

Although the September 14, 1998 order was supposed to have been mailed to the parties, undersigned counsel never received it in the mail. Unbeknownst to petitioner or his counsel, the federal habeas statute limitations expired on November 16, 1998. On February 17, 1999, undersigned counsel telephoned the Clerk of the North Carolina Court of Appeals and learned for the first time that the court had denied certiorari on September 14, 1998.

On February 17, 1999, upon learning that certiorari had been denied, undersigned counsel immediately requested relief from the September 14, 1998, order, but this request was denied by the N.C. Court of Appeals on February 23, 1999.

Federal Habeas Proceedings:

Petitioner's counsel immediately began preparation of federal pleadings. On March 4, 1999, counsel sent a *Petition for a Writ of Habeas Corpus*, related pleadings and filing fee to the Clerk of the U.S. District Court for the Middle District of North Carolina, via Federal Express, and it was received in that court on March 5, 1999.[1]

Respondent sought summary judgment on statute of limitations grounds under 28 U.S.C. § 2244(d). Petitioner acknowledged that the statute had run, but requested equitable tolling on grounds that he had been diligent and the nonreceipt of the State court order was an extraordinary

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[1] Petitioner's counsel was informed by the clerk's office that the habeas petition was received on March 5, 1999. However, due to the court's internal screening procedure for habeas corpus petitions, it was not stamped "filed" until March 26, 1999.

circumstance beyond his control.

Petitioner presented uncontroverted declarations to the effect that the reasonable practice of skilled and diligent attorneys in criminal appellate practice in North Carolina is to await receipt of orders from the N.C. Court of Appeals in ordinary course of the mail, and the order of the N.C. Court of Appeals had never been received in the mail by undersigned counsel. Even a period of many months between filing of a case and receipt of the N.C. Court of Appeals' decision is considered to be well within normal expectations. Petitioner established these facts in the district court below by filing authoritative declarations from (1) North Carolina Appellate Defender Malcolm Ray Hunter, probably the most experienced criminal appellate attorney in North Carolina, (2) Stanley Hammer, a certified specialist in criminal appellate practice, (3) Ken Rose the Director of the Center for Death Penalty Litigation, and (4) undersigned counsel. Respondent filed no countervailing declarations.

On March 24, 2000, U.S. Magistrate Judge Paul T. Sharp rejected petitioner's request for equitable tolling and recommended that the habeas petition be denied as untimely under 28 U.S.C. § 2244(d), and incidentally found the petition to be without merit. *See,* App. 8-18. Petitioner filed objections, but on July 21, 2000, U.S. District Judge William L. Osteen, Sr., entered an order adopting the Magistrate Judge's recommendation and dismissing the petition. *See,* App. 19.

By decision of November 15, 2000, a panel of the Fourth Circuit denied a certificate of appealability and dismissed the appeal for the reasons stated by the district court. App. 20-21. It is from this dismissal that petitioner now seeks relief in this Honorable Court.

Facts Underlying Petitioner's Constitutional Claims:

At the state court trial, the State presented evidence that petitioner was riding as a passenger in a rental car driven by one Rodney Squires. A state trooper stopped the car on an interstate highway in North Carolina, and a search consented to by Squires revealed a substantial quantity of cocaine hidden in the car.

This evidence would have been insufficient, as a matter of state law, to show that petitioner "possessed" the drugs found in the car since all appearances were that the car and its contents were under the control of Rodney Squires – but for the testimony of one Gregory Gilley. Gilley testified that petitioner had solicited Gilley to come from New York to North Carolina and give false testimony that Gilley, not petitioner, was responsible for hiding the cocaine in the car. Under state law, Gilley's testimony supplied a "suspicious circumstance" implicating petitioner in the possession of the cocaine, and allowing the case to reach the jury and sustaining the jury's guilty verdict.

However, Gilley testified favorably to the State under extremely coercive pressures: A week before petitioner's trial, Gilley had testified at the trial of Rodney Squires to the effect that he, Gilley, had hidden the cocaine in the car, not Squires. Immediately following Gilley's testimony on behalf of Squires, Gilley was accosted by three State Troopers in the men's room outside the courtroom. He was arrested and brought to the prosecutor's office. There, he was interrogated without benefit of counsel by no less than five State officials (three State Troopers, an S.B.I. Agent and an Assistant District Attorney). Gilley was then charged with perjury, a Class F felony carrying a possible maximum penalty of 59 months imprisonment.

Gilley spent that night in jail. The next morning, he was brought back to the courtroom and recalled to the witness stand by the State. He testified to the State's

satisfaction against Rodney Squires, and inculpated petitioner Phillip as well. At this time, Gilley was still without benefit of counsel. During his testimony, Gilley was held in contempt of court and sentenced to ten days in jail for refusing to answer a question from Squires' attorney. After Squires was convicted, Gilley was placed in the Guilford County Jail under a $100,000 secured bond, far from his home in New York. He was given a court date on the perjury charge almost a month in the future, and appointed a lawyer.

It was after Gilley had spent a week in jail on the charge of perjury in the Squires case that he was called by the State to testify at the trial of petitioner Phillip. Gilley testified against petitioner to the State's satisfaction to the effect that petitioner had solicited his false testimony, resulting in petitioner 's conviction. The very next day, the State voluntarily dismissed Gilley's perjury charge and he was released.

The forgoing coercive pressures placed by the State upon it's key witness were not made the subject of any motion or objection by petitioner's trial or appellate counsel in the state court proceedings. The State postconviction court held that the State's treatment of witness Gilley did not violate petitioner's due process rights, that the failure to raise an objection thereto did not constitute ineffective assistance of trial or appellate counsel, and that all issues were procedurally barred under N.C. Gen. Stat. § 15A-1419(b) for failure to raise them on direct appeal. *See,* App. 1-6.

Petitioner argued to the court below that these facts established both a due process violation under *Webb v. Texas,* 409 U.S. 95, 34 L.Ed.2d 330, 93 S.Ct. 351 (1972), and *United States v. McCloskey,* 682 F.2d 468, 479 (4th Cir. 1982) (both decisions establishing that due process is violated when a defendant is convicted through testimony of a witness who has been coerced into materially altering his or her testimony in favor of the state by means of a threatened perjury prosecution), and a violation of the right to effective

assistance of counsel under *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Petitioner further argued that the State court's finding of procedural bar was manifestly incorrect as applied to the claim of ineffective assistance of counsel on direct appeal, and as applied to ineffective assistance of trial counsel based upon all of the matters regarding Gilley that were outside the trial record.

The Magistrate Judge's Recommendation relied upon by the court was almost entirely concerned with the statute of limitations issue; it simply mentioned, without explanation, that petitioner's habeas petition was "without merit." *See,* App. 18.

REASONS FOR GRANTING THE WRIT

I. EQUITABLE TOLLING OF THE HABEAS CORPUS STATUTE OF LIMITATIONS, 28 U.S.C. § 2244(d), SHOULD NOT BE DENIED TO A HABEAS PETITIONER WHERE THE LIMITATIONS PERIOD LAPSED DUE TO THE LOSS OF A STATE COURT ORDER IN THE MAIL.

Although this Court has never explicitly so held, there is little question that the limitations period of 28 U.S.C. § 2244(d) is subject to "equitable tolling," at least in principle. *See, Harris v. Hutchinson,* 209 F.3d 325, 328-29 (4th Cir. 2000), *citing, Davis v. Johnson,* 158 F.3d 806, 810 (5th Cir. 1998); *Miller v. New Jersey State Dep't of Corrections,* 145 F.3d 616, 617-18 (3d Cir. 1998); *Miller v. Marr,* 141 F.3d 976, 978 (10th Cir. 1998); *Calderon v. United States District Court,* 128 F.3d 1283, 1288-89 (9th Cir. 1997).

The limitations period is subject to equitable tolling where, "due to circumstances external to the party's own conduct -- it would be unconscionable to enforce the limitation period against the party and gross injustice would

result." *Harris, supra* (ultimately denying equitable tolling where petitioner's counsel miscalculated the date upon which the limitations period would expire). The petitioner must show exercise of "reasonable diligence" in pursuing his claims – mere excusable neglect is insufficient. *Miller v. New Jersey State Department of Corrections, supra.*

When a litigant seeks equitable relief from a rigid application of a statutory limitations period for initiating suit, "the basic inquiry is whether congressional purpose is effectuated by tolling the statute of limitations in given circumstances." *Burnett v. New York Central Railroad Co.*, 380 U.S. 424, 85 S.Ct. 1050, 13 L.Ed.2d 941 (1965).

A prisoner *cannot* file his or her federal habeas petition until the last State Court has issued a written order denying his constitutional claims. *Cf., Artuz v. Bennett,* ___ U.S. ___, 121 S.Ct. 361, 148 L.Ed.2d 213 (2000). The legislative policy behind the exhaustion requirement is clearly to encourage habeas litigants to *wait* for the last State court to issue its order, before proceeding into federal court. The limitations period contained in 28 U.S.C. § 2244(d) therefore should not be applied in such a manner as to discourage habeas petitioners from patiently waiting for the State courts to act.

In another case, the Fourth Circuit expressly left open the question of whether delayed receipt of the final State Court order justifies equitable tolling under 28 U.S.C. § 2244(d). *Hernandez v. Caldwell,* 225 F.3d 435, 439 n. (4th Cir. 2000). The Fourth Circuit has not previously addressed the question whether *loss* of a state court order in the mail justifies equitable tolling.

The decision of the Fourth Circuit in the case at bar effectively denies equitable tolling to a habeas petitioner who has diligently pursued his state and federal remedies, and misses the federal limitations period because the required last State Court order showing exhaustion of state remedies is lost in the mail.

First, the Court below held that equitable tolling was *foreclosed* by petitioner's own lack of "due diligence" simply because he first filed his state postconviction pleadings with only two months left on the federal limitations clock. *See,* App. 15. That cannot be right. Filing state postconviction pleadings with two months still left on the federal clock effectively tolled the federal limitations period under 28 U.S.C. § 2244(d)(2) with ample time remaining for preparation of federal pleadings, and shows, if anything, diligence and attention to the federal limitations statute.

Second, the court below held it was a "close question" whether petitioner's counsel exercised "due diligence" in relying upon the U.S. Mail in his communications with the North Carolina Court of Appeals, awaiting a decision for five months before telephoning the court to inquire into the status of the case. *See,* App. 16. The Court below simply ignored petitioner's submission of uncontroverted declarations from three other attorneys, unconnected with this case and exceptionally well-positioned to know what constitutes reasonable and diligent conduct in North Carolina criminal appellate practice, to the effect that his counsel's conduct was reasonable and diligent.

Finally, the Court below expressed skepticism that the State court order even was lost as petitioner claimed, noting "the difficulty of Petitioner's proof." *See,* App. 17. The Court fails to note that the loss of the order in the mail was *never contested* by the Respondent, either by argument or by submission of countervailing declarations. On summary judgment, the facts are to be taken in the light most favorable to the non-moving party. This petitioner submitted as much proof that the State court order was not delivered to him as will *ever* be available in a case such as this, and this was sufficient to establish the point for purposes of resisting summary judgment.

Thus, the Court below has contorted reason and fairness to deny equitable tolling to this petitioner, in a manner

that would deny equitable tolling to *any* petitioner who claims that he simply was not informed of the State court's decision in his case through a manifestly apparent failure of mail delivery.

The decision of the Court below is squarely in conflict with the decision of the Fifth Circuit U.S. Court of Appeals in *Phillips v. Donnelly,* 216 F.3d 508 (5th Cir. 2000). The Fifth Circuit held that a four-month delay in notification (tantamount to a "loss" of the state court order, although the opinion does not explain the cause of the delay), would justify equitable tolling if established to the court's satisfaction. The case is remarkably similar to the case at bar, down to the petitioner's surname:

> In this case, the purported delay in receiving notice of the denial was four months. And Phillips pursued the process with diligence and alacrity: he filed for an out-of-time appeal within three days of allegedly receiving notice of the denial. He then filed his federal habeas corpus appeal within one month of the denial of the out-of-time appeal. Thus, we conclude that the delay in receiving notification that Phillips describes could qualify for equitable tolling. . . .
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> . . . This all assumes that Phillips can establish that he did not receive notice of the denial of his appeal until August 29, 1997. Although we have not found any cases discussing who bears the burden of proof concerning equitable tolling in the AEDPA context, we believe the defendant should bear this burden. . . . We therefore REMAND the case to the district court for a hearing as to whether Phillips first received notice of the

denial on August 17, 1997.

216 F.3d at 511 (emphasis added). *See also, Brandon v. United States*, 89 F. Supp. 2d 731 (E.D.Va., March 2, 2000) (equitable tolling granted where neither petitioner nor his counsel received notice of a state court order until after the limitations period had expired); *Vasquez v. Greiner*, 68 F. Supp. 2d 307, 310 (S.D.N.Y. 1999) (factual dispute as to when petitioner first learned of the finality of his conviction precluded dismissal of the petition as untimely); *Baskin v. United States*, 998 F. Supp. 188, 190 (D. Conn. 1998) (equitable tolling granted where petitioner's counsel failed to notify him of the denial of certiorari until thirteen months after it occurred).

In the case at bar, petitioner's non-receipt of the state court order was established by the declaration of undersigned counsel. The reasonableness and diligence of undersigned counsel's conduct was established by declarations of three other attorneys exceptionally well-positioned to know what constitutes reasonable and diligent conduct. At a minimum, petitioner's uncontroverted declarations precluded summary judgment for respondent on the limitations issue, and entitled petitioner to a hearing as in *Phillips v. Donnelly*.

This case is worthy of review by the United States Supreme Court because (1) the contours of the doctrine of equitable tolling have never been addressed by this Court in the context of 28 U.S.C. § 2244(d), and Circuit level decisions have provided only vague guidance; (2) the decision of the Court below is in conflict with the decision of the Fifth Circuit in *Phillips v. Donnelly, supra*; and (3) the decision of the Court below wrongly burdens both habeas petitioners and their counsel with heightened and unrealistic burdens of showing "due diligence" in order to be eligible for equitable consideration from the Court.

For these reasons, petitioner respectfully prays that this Court will issue its Writ of Certiorari and order full

review of the decision of the court below denying equitable tolling.

II. IT CLEARLY VIOLATES A CRIMINAL DEFENDANT'S RIGHT TO DUE PROCESS OF LAW AND THE EFFECTIVE ASSISTANCE OF COUNSEL TO CONVICT HIM UPON THE TESTIMONY OF A KEY WITNESS WHO COMPLETELY CHANGES HIS TESTIMONY UPON BEING ARRESTED BECAUSE OF HIS TESTIMONY, CHARGED WITH PERJURY AND THROWN IN JAIL UNDER A HIGH BOND, AND DEFENSE COUNSEL FAILS TO OBJECT EITHER AT TRIAL OR ON DIRECT APPEAL.

A principle witness against this petitioner was coerced by being imprisoned and prosecuted for perjury during petitioner's trial, as a result of which the witness's testimony changed in the state's favor and to petitioner's prejudice. This clearly violated due process under *Webb v. Texas*, 409 U.S. 95, 34 L.Ed.2d 330, 93 S.Ct. 351 (1972) and its progeny. *See, e.g., United States v. McCloskey*, 682 F.2d 468, 479 (4th Cir. 1982) (prosecutor's threat to reinstate indictment against defense witness if her testimony was self-incriminating caused her to invoke Fifth Amendment privilege); *Bray v. Peyton*, 429 F.2d 500, 501 (4th Cir. 1970) (prosecutor's arrest of defense witness on the basis of his testimony had an intimidating effect on the defendant's three other witnesses).

In the case at bar, Gregory Gilley testified under extraordinary coercion. One can scarcely imagine a more effective way to crush a defense witness into changing his tune than to arrest him in the courthouse on account of his exculpatory testimony, threaten to prosecute him for the conduct of which the defendant stands charged, actually charge him with perjury, throw him in jail under $100,000 bond, and then keep him there until he testifies favorably to

the State.

In *Webb*, this Court held that due process was violated because the trial court's unnecessarily strong admonition of the consequences of perjury effectively deprived the defendant of a witness's exculpatory testimony. If the State's treatment of Gregory Gilley does not fall reasonably within *Webb's* prohibition of an "unnecessarily strong" admonition of the potential consequences perjury, then *Webb* is a dead letter.

These principles are familiar to the courts and defense attorneys of North Carolina. State law decisions such as the following, from the North Carolina Court of Appeals, have put members of the bar on notice to raise a constitutional objections under circumstances such as those presented in the case at bar:

> Substantial government interference with the voluntariness of a witness's choice of whether or not to testify and with the content of that testimony infringes on a defendant's constitutional right to present witnesses to establish his defense. *Webb v. Texas,* 409 U.S. 95, 34 L.Ed.2d 330, 93 S.Ct. 351 (1972); *United States v. Hammond,* 598 F.2d 1008 (5th Cir. 1979); *Bray v. Peyton,* 429 F.2d 500 (4th Cir. 1970). . . .
>
> We hold that defendant in this case was denied his due process rights by the prosecution's intimidation of Gregory Moore which resulted in Moore's returning to the stand and repudiating his earlier testimony that had been exculpatory to defendant. There can be little doubt that the confrontation by Detective Phillips with the threats of prosecution for perjury was responsible for Moore's subsequent course of action. Although the witness was not intimidated by

> the judge as was the case in *State v. Rhodes, supra,* we find that Moore's intimidation by a police detective and the offer of immunity by the District Attorney, who are symbols of government's power to prosecute offenders, likewise deprived defendant of due process of law. *See, United States v. Morrison,* 535 F.2d 223 (3d Cir. 1976). A criminal defendant has the right to present his own version of the facts and to present his own witnesses without unwarranted judicial or prosecutorial interference. *Id.* The intimidation of the witness Moore infringed on defendant's constitutional right to have Moore's freely-given testimony.

State v. Mackey, 58 N.C. App. 385, 387-88, 293 S.E.2d 617, 618-19 (1982), *review denied, appeal dismissed,* 306 N.C. 748, 295 S.E.2d 761 (1982). *See also, State v. Melvin,* 326 N.C. 173, 388 S.E.2d 72 (1990).

In the case at bar, Gilley's testimony was essential to the State because petitioner's mere presence as a passenger in the car was insufficient as a matter of law to convict him of trafficking in narcotics found hidden in the trunk of the car. All of the evidence pointed to Rodney Squires as the one in possession and control of the car and its contents: he was driving, he was listed on the rental agreement as an authorized driver, he was the one in charge who spoke with the State Trooper and authorized the search. None of the other evidence rose to the level of "suspicious circumstances" sufficient in themselves to justify submitting the case to the jury.[2]

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[2] *See, State v. McLaurin,* 320 N.C. 143, 146-47, 357 S.E.2d 636 (1987) (where control of a place where contraband is found is non-exclusive, constructive possession may not be inferred without other

The trial attorney defending this case could have readily located *State v. Mackey, Webb v. Texas,* and other case authorities cited above, and lodged a meritorious objection to Gregory Gilley's testimony on grounds that he was then in jail under a charge of perjury relating to his potential testimony in the case. Such an objection would have resulted in Gilley's testimony being excluded, and the State would have had insufficient evidence remaining to reach the jury as a matter of state law. Instead, trial counsel did nothing. This failure clearly violated petitioner's right to effective assistance of counsel under *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) and its progeny. *See, Murray v. Carrier,* 477 U.S. 478, 496, 106 S.Ct. 2639 (1986) (a single, isolated error can constitute ineffective assistance of counsel "if that error is sufficiently egregious and prejudicial").

At a minimum, petitioner was entitled to an evidentiary hearing at which to prove these violations of due process and the right to effective counsel, yet the state postconviction court, the court below, and the panel all denied him that opportunity.

The decision of the court below is in direct conflict with this Court's decision in *Webb v. Texas, supra.* This issue presented is exceptionally important because of the

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incriminating circumstances); *State v. Minor,* 290 N.C. 68, 224 S.E.2d 180, 185 (1976) (evidence that defendant was a passenger in co-defendant's car, and that he was a friend and visitor of co-defendant, was insufficient to establish defendant's constructive possession of marijuana found in the back seat and trunk of car); *State v. Boone,* 310 N.C. 284, 311 S.E.2d 552 (1984) (where defendant was a passenger in a car, and marijuana was found in the trunk where it had been placed by a third party, there was insufficient evidence of constructive possession by defendant); *State v. Weems,* 31 N.C. App. 569, 230 S.E.2d 193 (1976) (evidence that defendant was a passenger in a car was insufficient to prove constructive possession of drugs found in the console of the car and behind the seat).

fundamental due process rights that stand to be lost when a State is allowed to obtain a conviction by threatening, jailing and prosecuting a defense witness because of his testimony, thereby converting him into a state's witness.

Furthermore, the State court's finding of procedural bar – which has never been mentioned in any of the federal court decisions in this case – is highly suspect. According to the State court order, petitioner's claim that both his trial *and appellate* counsel were ineffective for failing to raise the *Webb v. Texas* issue in the direct appeal was defaulted because the issue of ineffective counsel was not raised in the direct appeal itself. While it is not at all clear that ineffective assistance of trial counsel must be raised on direct appeal in North Carolina,[3] it is obvious that a claim of ineffective *appellate* counsel cannot possibly be raised until after the direct appeal is over. In the end, the state court's procedural default ruling is inextricably bound to its decision rejecting petitioner's underlying due process claim – if petitioner wins the due process issue, then either his trial counsel or his appellate counsel surely should have raised an objection, and petitioner should win his ineffective assistance claim as well.

For these reasons, petitioner respectfully prays that this Court will order full review the decision of the court below denying petitioner relief on grounds his constitutional rights to due process and effective assistance of counsel were violated.

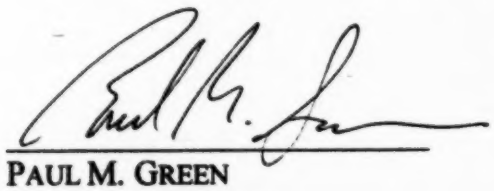
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[3] In general, ineffective assistance of counsel claims are supposed to be raised in a postconviction motion for appropriate relief. *See, State v. Vickers,* 306 N.C. 90, 95, 291 S.E.2d 599, 603 (1982).

CONCLUSION

For the reasons stated herein, petitioner respectfully requests that a writ of *certiorari* issue to review the decision of the Fourth Circuit United States Court of Appeals, to the end that the judgment below be reversed.

Respectfully submitted, this the 6th day of February, 2001.



PAUL M. GREEN
Counsel of Record
1304 CAROLINA AVE.
DURHAM, N.C. 27705-3206
(919) 286-2212